90-231

CASE NO. _____

IN THE

# Supreme Court of the United States

October Term, 1989

STATE OF FLORIDA,

*Petitioner,*

vs.

DUANE EUGENE OWEN,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ROBERT A. BUTTERWORTH
Attorney General

RICHARD E. DORAN
Assistant Attorney General
(Counsel of Record)

GEORGINA JIMENEZ-OROSA
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

July 31, 1990

## QUESTION PRESENTED FOR REVIEW

WHETHER, PARTICULARLY IN VIEW OF THE CONFLICT BETWEEN THE STATE AND FEDERAL COURTS, *MICHIGAN V. MOSLEY,* 423 U.S. 96 (1975), SHOULD BE REVISITED TO ADDRESS THE UNRESOLVED FIFTH AMENDMENT ISSUE OF WHETHER MERELY SAYING "I DON'T WANT TO TALK ABOUT IT" — MEANING A PARTICULAR FACT OR POINT — TRIGGERS THE TYPE OF PROHIBITION ON FURTHER POLICE INITIATED CONVERSATION RECOGNIZED IN SIXTH AMENDMENT CASES SUCH AS *EDWARDS V. ARIZONA,* 451 U.S. 477 (1967); OR ALTERATIVELY, WHETHER *MICHIGAN V. MOSLEY* SHOULD BE ABANDONED.

## TABLE OF CONTENTS

## TABLE OF CITATIONS

STATUTES AND CONSTITUTIONS

CASE NO. _____

IN THE

# Supreme Court of the United States

October Term, 1989

STATE OF FLORIDA,

*Petitioner,*

vs.

DUANE EUGENE OWEN,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

## OPINION BELOW

The decision of the Supreme Court of Florida, rendered on March 1, 1990, is reported at 560 So.2d 207 (Fla. 1990). It is reproduced in the Petitioner's appendix at A-3. Rehearing was denied on May 2, 1990. App. A-2. The state trial court's oral findings and ruling denying the defendant's motion to suppress are reproduced in the Petitioner's Appendix at A-22.

## JURISDICTION

The opinion and judgment of the Supreme Court of Florida was rendered on March 1, 1990. The Petitioner timely filed its petition for rehearing. The motion for rehearing was denied on May 2, 1990. The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of Title 28 U.S.C. § 1257.

## FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, *United States Constitution* provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, *United States Constitution,* provides in pertinent part:

> . . . nor shall any state deprive any person of life, liberty or property, without due process of law. . .

## STATEMENT OF THE CASE AND FACTS

The opinion of the Supreme Court of Florida details the factual background to this crime. *Owen v. State*, 560 So.2d 207 (Fla. 1990). (A-3). Owen was convicted of burglary, sexual battery and first-degree murder of a young baby-sitter in March, 1984 in Delray Beach, Florida. He was picked up by police in Boca Raton, Florida, on suspicion of burglary. Id. at 207. After he was booked, he initiated contact with police and was interrogated "relative to various crimes which occurred in the spring of 1984." *Id.* The Supreme Court of Florida noted:

> During these interrogations, Owen expressed contempt for lawyers and a desire to help clean up crimes with which he had been charged or suspected. He specifically stated that he did not want a lawyer present but he asked that a certain officer (Woods) from Delray Beach who knew him from previous encounters be present for the interrogation.

*Id.*

During this conversation, Respondent said he knew he was implicated in a separate homicide and that he had been found out through the fingerprint in the book. Although denouncing any involvement in the instant murder, Respondent, after listening to the evidence collected in the case, asked Officer Lincoln questions about the evidence and inquired whether that was all they have against him. At this point, the two challenged statements. "I'd rather not talk about it," and "I don't want to talk about it," were made by Respondent. (The pertinent portions of the conversations are detailed in the dissenting opinion of Justice Grimes). (A-11)

A break was taken shortly after the last statement of Respondent. After the break, Respondent inquired about the possibility of the officers bringing his brother to see him after that day and expressed other personal concerns. He then acknowledged that the officers had enough evidence to charge him with the second murder and proceeded to confess.

The conviction and death sentence were reversed on the basis of the statements given after the response, "I'd rather not talk about it." *Id.* at 211.

The instant Petition for Writ of Certiorari follows.

## REASONS FOR GRANTING THE WRIT

In *Michigan v. Mosley,* 423 U.S. 96 (1975), this Honorable Court held that *Miranda v. Arizona,* 384 U.S. 436 (1966), does not create a per se proscription against all further interrogation once a defendant expresses an equivocal desire to remain silent. Relying on *Mosley,* federal courts have decided that a defendant may selectively waive his *Miranda* rights, deciding to "respond to some questions but not others." *See, Bruni v. Lewis,* 847 F.2d 561, 563 (9th Cir. 1988); *cert. denied,* ___ U.S. ___, 109 S.Ct. 403 (1989); *United States v. Thierman,* 678 F.2d 1331, 1335 (9th Cir. 1982); *United States v. Lorenzo,* 570 F.2d 294 (9th Cir. 1978); *United States v. Ford,* 563 F.2d 1366 (9th Cir. 1977), *cert. denied,* 434 U.S. 1021 (1978).

Through the exercise of the option to terminate questioning, a suspect can control the subjects discussed, the time at which questioning occurs, and the duration of the interrogation. *Mosley,* 423 U.S. 96, 103-04. In the case at bar, Respondent chose which questions he desired to answer in order that he could find out the amount of evidence the police had on him, on the Slattery murder, before he could

decide, in his own mind, whether he should confess to this murder as well. 560 So.2d at 210-11. There is no evidence in the record that the police did not completely respect the limitations set by Respondent. *Id.* Thus, this case presets a factual situation analogous to the one hypothesized by Mr. Justice White in his *Mosley* dissent:

> The majority's rule may cause an accused injury. Although a recently arrested individual may have indicated an initial desire not to answer questions, he would nonetheless want to know immediately — if it were true — that his ability to explain a particular incriminating fact or to supply an alibi for a particular time period would result in his immediate release. Similarly, he might wish to know — if it were true — that (1) the case against him was unusually strong (2) and that his immediate cooperation with the authorities in the apprehension and conviction of others or in the recovery of property would rebound to his benefit in the form of a reduced charge.

423 U.S. at 109. *See, also, Thierman, supra,* 678 F.2d at 1335.

*Miranda* should not preclude officers, after a defendant has invoked his rights, from informing the defendant of evidence against him or of other "circumstances which might contribute to an intelligent exercise of his judgment." *United States v. Rodriguez-Gastelum,* 569 F.2d 482, 486-488 (9th Cir.), *cert. denied,* 436 U.S. 919 (1978).

The developing case law supports Justice White's *Mosley* dissent by holding that informing a defendant of circumstances which contribute to an intelligent exercise of his judgment is normally attendant to arrest and custody. *Thierman, supra,* 678 F.2d at 1334 n. 3. *See also, Johnson v. Zerbst,* 304 U.S. 458 , 464 (1938).

It is respectfully submitted that this Court should reexamine and revisit *Mosley* because it now leads to absurd results. The Supreme Court of Florida has reached the type of result Justice White feared in his *Mosley* dissent:

> In justifying the implication that questioning must inevitably cease for some unspecified period of time following the exercise of the "right to silence", the majority says only that such a requirement would be necessary to avoid "undermining" "the will of the person being questioned." Yet, surely a waiver of the "right to silence" obtained by "undermining the will" of the person being questioned would be considered an involuntary waiver. Thus, in order to achieve the majority's only stated purpose, it is sufficient to exclude all confessions which are the result of involuntary waivers. To exclude any others is to deprive the fact-finding process of highly probative information for no reason at all.

*Id.*, 423 U.S. at 111. This is precisely what occurred in the instant case. As noted by the Supreme Court of Florida, the Respondent was asked "a relatively insignificant detail" question to which he responded, "I'd rather not talk about it." 560 So.2d at 211. Rather than exploring what Owen meant by this remark, the police "urged him to clear matters up." Owen then began responding with incriminating information. He also asked questions of the police. *Id.* When asked another relatively insignificant detailed question, Owen again said, "I don't want to talk about it." The police urged him to again clear things up. *Id.*

Citing two cases, *Long v. State*, 517 So.2d 664 (Fla. 1987), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1754, 100 L.Ed.2d 216 (1988), and *Martin v. Wainwright*, 770 F.2d 918 (11th Cir. 1985), *modified*, 781 F.2d 185 (11th Cir.), *cert. denied*, 479

U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986), the Supreme Court of Florida held that the absence of any Fifth or Sixth Amendment violation was irrelevant to the question of whether Owen's confession should be excluded from evidence. The court held that the mere violation of *Miranda* procedures compelled the finding of error which was then to be reviewed under the harmless constitutional error standard of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *Id.* Neither case is dispositive of the issue presented and each exhibits the continuing frustrations and difficulties courts have encountered as cases develop in the post-*Miranda* era. For example, *Long v. State* involved a finding of violation of a defendant's Sixth Amendment right to invoke counsel. The Supreme Court of Florida relied on *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), *Miranda v. Arizona, supra,* and *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), to find that the police's failure to clarify Long's mental state after he indicated "I think I might need an attorney", 517 So.2d at 667, violated Long's Sixth Amendment right. This case implicates no Sixth Amendment concerns. Thus, the reliance upon *Long* is wholly inappropriate and in conflict with the very cases cited by the court in *Long, i.e., Miranda, Edwards,* and *Rhode Island v. Innis.*

The Supreme Court of Florida's reliance on *Martin, supra,* is equally troubling. In *Martin,* the defendant told police during his interrogation that he did not want to immediately continue the discussion but rather "Can't we wait until tomorrow?" 770 F.2d at 923. In response to that question, the police responded, "Let's go on." *Id.* In a troubling bit of logic, the Eleventh Circuit Court of Appeals reasoned that Martin's request to hold off further questioning until the next day was equivocal to invocation of his Sixth Amendment right to counsel. Specifically, the court found as follows:

> It is true that Martin's request "Can't we wait until tomorrow," was an equivocal invocation of his right to cut off questioning, and that Martin never explicitly refused to answer any more questions. Nevertheless, Detective Anderson's continuance of the interrogation was improper. We previously have held that equivocal invocations of the right to counsel immediately limit the scope of police questioning to "clarifying the equivocal request."
>
> * * *
>
> We see no reason to apply different rule to equivocal invocations of the right to cut off questioning.

*Id.* at 923-924. In reaching this conclusion, the Eleventh Circuit Court of Appeals flatly stated that its position was in direct conflict with the position the Ninth Circuit Court of Appeals reached in *United States v. Thierman, supra. Id.* at 924 n. 6. In *Thierman,* the court held:

> The record supports the district court's conclusion that Thierman knowingly and voluntarily waived his right to remain silent. Twice Thierman was advised of his *Miranda* rights and each time he agreed to answer some questions and refused to answer questions on certain topics. A person in custody may selectively waive his right to remain silent by indicating he will respond to some questions, but not to others. *United States v. Lopez-Diaz,* 630 F.2d 661, 664 n. 2 (9th Cir. 1980); *United States v. Lorenzo,* 570 F.2d 294, 297-98 (9th Cir. 1978). Through the exercise of the option to terminate questioning, a suspect can control the subjects discussed, the time at which questioning occurs, and the duration of the interrogation. *Michigan v. Mosley,* 423 U.S. 96, S.Ct. , L.Ed.2d (19). Thierman chose only to limit the subjects

> discussed and there is no evidence in the record that the police did not completely respect that limitation.

678 F.2d at 1335. Clearly, the facts outlined in the Supreme Court of Florida's opinion below mirror the facts in *Thierman*. After numerous and detailed presentation of *Miranda* warnings by the police, Respondent continually engaged in a question and answer session with the police officers during which he twice responded to fact-specific limited questions by saying, "I'd rather not talk about it." 560 So.2d at 211.

The Supreme Court of Florida's reliance on *Martin* and its Sixth Amendment based analysis is wholly inconsistent with *Thierman, supra,* and with *Michigan v. Mosley, supra.* As noted above, this case is the perfect example of why Justice White's dissent in *Michigan v. Mosley* provides an appropriate standard for reviewing non-Sixth Amendment announcements made by suspects in police custody.

In this case, the record reveals Respondent was a bright person, with some years of college education, who had once aspired to be a police officer. He enjoyed talking "law" with the officers investigating the crimes he was suspected of having committed. As the court below found:

> Through the interrogation sessions, Owen had indicated his desire to confess to crimes for which he felt the police had sufficient evidence to convict. Consequently, there evolved a procedure whereby the police officers would present their evidence and attempt to persuade him that they had the necessary proof.

560 So.2d at 210.

The opinion of the Supreme Court of Florida indicates that Respondent, at all times including the June 21st interview, was in "control [of] the time at which questioning occurs, the

subject discussed, and the duration of the interrogation." *Mosley,* 423 U.S. 96, 103-104. 560 So.2d at 210-11. Dissenting in this case, Justice Grimes noted:

> While the police in this case did not immediately cease questioning Owen on the two topics he indicated a reluctance to discuss — whether the house had been predetermined and where the bicycle had been left — their follow-up questions can fairly be seen as attempts to determine what Owen did mean. In any event, Owen did not make meaningful responses to these inquiries and the discussion shifted to other aspects.

560 So.2d at 216.

Through the conversations between the officers and Respondent on the six different occasions, Respondent had established a pattern of answering the questions he wished to and confessing only when he felt good and ready, but after he had ascertained in his own mind that the police had enough evidence to charge him with the particular crime.

The Court should take this case because it is abundantly clear that the original promise of *Miranda,* providing each citizen with a shorthand accounting of his federal constitutional rights, has been, over time, firmly rooted in the American culture. However, the lower courts have continued to allow this core function of *Miranda* to be mutated and misconstrued to the point where cases such as *Michigan v. Mosley* now provide a criminal defendant with a sword rather than a shield for his battle against governmental authority. If cases such as *Owen* cannot be harmonized with the standard set forth in *Michigan v. Mosley,* then the Petitioner respectfully suggests that *Michigan v. Mosley* be overturned. A good starting place for such analysis would be Mr. Justice White's dissenting opinion as discussed above. Assuming the Court is not willing to take such drastic

action, the Petitioner would respectfully suggest that the case be accepted in order to resolve conflict between *Martin v. Wainwright* from the Eleventh Circuit and *Thierman* from the Ninth Circuit. See dissent of Justice Grimes at 560 So.2d 214.

It should be enough to find on appeal that none of Respondent's federal constitutional rights were violated. While acknowledging that truth, the Supreme Court of Florida has still placed him in a position, by suppressing his statements and confessions, that he may literally get away with murder.

## CONCLUSION

For these reasons, the Petitioner, the State of Florida, respectfully prays this Honorable Court will accept this case for further review.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General Florida

RICHARD E. DORAN
Assistant Attorney General
(Counsel of Record)

GEORGINA JIMENEZ-OROSA
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

CASE NO. _____

IN THE

# Supreme Court of the United States

October Term, 1989

STATE OF FLORIDA,

*Petitioner,*

vs.

DUANE EUGENE OWEN,

*Respondent.*

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ROBERT A. BUTTERWORTH
Attorney General

RICHARD E. DORAN
Assistant Attorney General
(Counsel of Record)

GEORGINA JIMENEZ-OROSA
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

## TABLE OF CONTENTS

# Supreme Court of Florida

Wednesday, May 18, 1990

DUANE EUGENE OWEN,

*Appellant,*

vs. – Case No., 68,550

STATE OF FLORIDA,

*Appellee.*

Circuit Court Case No. 84-4014-CF A02
(Palm Beach County)

---

Appellee's Motion to Stay Mandate is hereby granted and proceedings in this Court and in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida are hereby stayed pending filing and resolution of review in the United States Supreme Court.

A True Copy TC

TEST cc: Hon. John B. Dunkle, Clerk
Hon. Richard B. Burk, Judge
Mr. Duane Eugene Owen
Theodore S. Booras, Esquire
Celia Terenzio, Esquire

By:_____/s/_____
Sid J. White
Clerk, Supreme Court

# Supreme Court of Florida

Wednesday, May 2, 1990

DUANE EUGENE OWEN,

*Appellant,*

vs. Case No., 68,550

STATE OF FLORIDA,

*Appellee.*

Circuit Court Case No. 84-4014-CF A02
(Palm Beach County)

---

The Motions for Rehearing, having been considered in light of the revised opinion, are hereby denied.

EHRLICH, C.J., and OVERTON, McDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur as to Appellant's Motion

OVERTON, McDONALD, SHAW, BARKETT and KOGAN, JJ., Concur, but EHRLICH, C.J., and GRIMES, JJ., Dissent as to Appellee's Motion

A True copy JB

TEST: cc: John B. Dunkle, Clerk
Hon. Richard B. Burk, Judge
Duane Eugene Owen, Pro Se
Theodore S. Booras, Esquire
Georgina Jimenez-Orosa, Esquire

Sid J. White
Clerk Supreme Court

# Supreme Court of Florida

REVISED OPINION

NO. 68,550

DUANE EUGENE OWEN, *Appellant,*

vs.

STATE OF FLORIDA, *Appellee.*

[March 1, 1990]

PER CURIAM.

Appellant Owen was convicted of burglary, sexual battery, and first-degree murder. The jury recommended and the judge imposed a death sentence for the murder. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

The victim was baby-sitting for a married couple on the evening of March 24, 1984, in Delray Beach. During the evening, she called home several times and spoke with her mother, the last call taking place at approximately 10 p.m. When the couple returned home, just after midnight, the lights and the television were off and the baby-sitter did not meet them at the door as was her practice. The police were summoned and the victim's body was found with multiple stab wounds. There was evidence that the intruder entered by cutting the screen to the bedroom window. He then sexually assaulted the victim. A bloody footprint, presumably left by the murderer, was found at the scene.

In late May 1984, Owen was apprehended in Boca Raton after he was identified as a burglary suspect. Routine booking disclosed that there were outstanding warrants against him and while being held on these charges, he initiated

contact with the police and was interrogated relative to various crimes committed on June 3, 6, 7, and 8. He was also questioned relative to a May 29, 1984, burglary, sexual battery, and murder in Boca Raton. During these interrogations, Owen expressed contempt for lawyers and a desire to help clean up crimes with which he had been charged or suspected. He specifically stated that he did not want a lawyer present but he asked that a certain officer (Woods) from Delray Beach who knew him from previous encounters be present for the interrogation. After confession to numerous burglaries, sexual batteries, and lesser crimes, he refused to talk further to the police about the Boca Raton murder and terminated the interrogation. On June 18, he reinitiated contact with the police and renewed his spate of confessions. He also corrected and amplified earlier confessions. On June 21, the Delray Beach police obtained an inked impression of Owen's footprints and the Boca Raton police informed him that, based on fingerprints taken from the crime scene and other evidence, they were charging him with first-degree murder. After the Boca Raton police presented their evidence to Owen, he confessed to the May 29 burglary, sexual battery, and murder. His account of this crime was remarkably similar to his earlier confessions to three crimes where he removed his clothes, committed a burglary, and either choked or bludgeoned sleeping victims into unconsciousness before committing sexual battery.

Immediately after the above confession to the May 29 Boca Raton murder, the Delray Beach police interrogated Owen relative to the March 24 Delray Beach crime. He first denied any knowledge of this crime, but confessed after the police confronted him with the bloody footprint from the crime scene and the inked impression of his foot taken earlier that day. The details were again remarkably similar to those of the earlier confessions.

At trial, the state did not attempt to introduce similar fact evidence, but relied on Owen's confession and corroborating evidence. An expert on podiatry testified that the bloody footprint was consistent with Owen's, but did not identify him to the exclusion of others.

The primary issue raised by Owen concerns the admissibility of his confession. He contends that (1) the confession was compelled by improper psychological coercion in violation of his fifth amendment right to remain silent, and (2) the police violated *Miranda v. Arizona*, 384 U.S. 436 (1966), by continuing to question him after invoked the right to terminate questioning. He claims that the police had no well-founded suspicion upon which to stop and seize him on the street and that all subsequent confessions were thereby tainted. This argument is without merit. Owen was the subject of outstanding warrants and had been identified in a photographic lineup as a burglar. The officer who stopped him had been given a photograph and specifically alerted to watch for him in his known habitat. The police had more than founded suspicion, they had probable cause.

Owen's more serious argument is that he was psychologically coerced into confessing by extended interrogation sessions, feigned empathy, flattery, and lengthy discourse by the police. These interrogation sessions were videotaped and we have, as did the trial judge, the benefit of actually viewing and hearing them. It is clear from these tapes that the sessions were initiated by Owen, who was repeatedly advised of his rights to counsel and to remain silent. Moreover, he acknowledged on the tapes that he was completely familiar with *Miranda* rights and knew them as well as the police officers. It is also clear that the sessions, which encompasses six days, were not individually lengthy and that Owen was given refreshments, food, and breaks during the sessions. The tapes show that the confession was entirely voluntary under the fifth amendment and that no

improper coercion was employed. *Martin v. Wainwright,* 770 F.2d 918, 924-28 (11th Cir. 1985), *modified,* 781 F.2d 185 (11th Cir.), *cert. denied,* 479 U.S. 909 (1986).

Owen next argues that even if the confession was voluntary under the fifth amendment, it was nevertheless obtained in violation of the procedural rules of *Miranda.* On this point, we agree. Throughout the interrogation sessions, Owen had indicated his desire to confess to crimes for which he felt the police had sufficient evidence to convict. Consequently, there evolved a procedure whereby the police officers would present their evidence and attempt to persuade him that they had the necessary proof. On June 21, after the Boca Raton police presented the fingerprint evidence and the similarity of the crime to earlier burglary rapes to which Owen had confessed, he acknowledged his guilt and responded to further questions. Thereafter, the Delray Beach police took up questioning on the instant crime. After police presented evidence on the "matched" footprints, alluded to evidence they expected to develop and the close similarity of the crime to the Boca Raton murder and earlier burglaries and rapes, Owen closely studied the footprint impression and appeared to acknowledge the conclusiveness. However, when police inquired about a relatively insignificant detail, he responded with "I'd rather not talk about it." Instead of exploring whether this was an invocation of the right to remain silent or merely a desire not to talk about the particular detail, the police urged him to clear matters up. He was soon responding with inculpatory answers and asking questions of his own. After further exchanges and a question on another relatively insignificant detail, Owen responded with "I don't want to talk about it." Again, instead of exploring the meaning of the response, the police pressed him to talk.

When presented with the motion to suppress, the trial judge initially indicated that the continuation of the ques-

tioning after the responses appeared to be a clear violation of *Miranda,* rendering the statements thereafter inadmissible. However, after reviewing the complete interrogation sessions, the judge concluded that the responses were not an invocation of the right to remain silent. The ruling of the trial court on a motion to suppress comes to us clothed with a presumption of correctness and we must interpret the evidence and reasonable inference and deductions in a manner most favorable to sustaining the trial court's ruling. *McNamara v. State* 357 So.2d 410, 412 (Fla. 1978). The state urges that on the totality of the circumstances, we should affirm the ruling below. Counterposed to this argument is the well-established rule that a suspect's equivocal assertion of a *Miranda* right terminates any further questioning except that which is designed to clarify the suspect's wishes. See *Long v. State,* 517 So.2d 664 (Fla. 1987), *cert. denied,* 108 S.Ct. 1754 (1988), and cases cited therein; and *Martin,* where although there was no violation of the fifth amendment by continuing questioning after an equivocal invocation of *Miranda* rights, the court held that continued questioning was reversible error under *Miranda.* Given this clear rule of law, and even after affording the lower court ruling a presumption of correctness, we cannot uphold the ruling. The responses were, at the least, an equivocal invocation of the *Miranda* right to terminate questioning, which could only be clarified. It was error for the police to urge appellant to continue his statement. Such error is not, however per se reversible but before it can be found to be harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. State,* 386 U.S. 18, 24 (1967); *Martin v. Wainwright.* Applying this standard, we are unable to say in this instance that the error was harmless beyond a reasonable doubt. Even though there was corroborating evidence, Owen's statements were the essence of the case against him. We accordingly reverse

Owen's convictions on the basis of inadmissible statements given after the response, "I'd rather not talk about it."[1]

We address additional issues which may recur should a retrial occur. In accordance with section 921.143, Florida Statutes (1983), the trial judge heard testimony from the victim's family on the impact of the crime after receiving the jury's advisory recommendation of death. The judge did not have the benefit of *Booth v. Maryland,* 482 U.S. 496, (1987), and of *Grossman v. State,* 525 So.2d 833 (Fla. 1988), *cert. denied,* 109 S.Ct. 1354 (1989), but nevertheless recognized that victim impact evidence by family members could not be used as an aggravating factor. If a death penalty phase is reached in a retrial, such evidence should not be received.

During the guilt phase, the victim's mother was permitted to testify, over objection, concerning certain corroborating evidence. Owen claims that the evidence was not at issue and that permitting the victim's mother to take the stand was unduly prejudicial. At trial, the basis of the objection was that the mother had been unable to control her emotions during an earlier deposition and her testimony was being presented for the sole purpose of creating improper sympathy. The record does not show that the mother was unduly emotional during her testimony, which corroborated Owen's confession. The mother's testimony meets the relevancy test; we see no error.

Appellant also claims that the jury should have received a special instruction during the penalty phases stressing the extreme importance of the jury's advisory recommendation. In appellant's view, Florida's standard jury instruction denigrates the role of the jury contrary to *Caldwell v. Mississippi,* 472 U.S. 320 (1985). We have previously held,

---

1 Statements made before this response do not implicate *Miranda* rights.

contrary to appellant's position, that the standard jury instructions accurately reflect Florida law. *Combs v. State,* 525 So.2d 853 (Fla. 1988).

Owen also argues that the trial court erred in not directing a verdict on the sexual battery charge because the evidence shows that the victim was dead before sexual union and Florida law does not criminalize necrophilia. In support, he cites the testimony of the medical examiner that the victim had "probably" died from her massive wounds before being transported to the bedroom, where appellant confessed that he "raped her, I guess you could say."

In defining sexual battery, section 794.011, Florida Statutes (1983), refers to the victim as "another" and as "the person." We are satisfied that under the legislative definition a victim must be alive at the time the offense commences. Sexual union with a previously deceased person, as in a morgue, would not meet the definition of sexual battery. However, we do not believe that the legislature intended that a person who is alive at the commencement of an attack must be alive at the end of the attack. Here we need not decide this precise issue because the jury was instructed regarding the distinction between sexual battery on a live person and attempted sexual battery on a victim killed in the course of the crime before sexual union is achieved. The verdict of guilt on the sexual battery count resolves this question of fact. In denying the motion for a directed verdict, the trial court relied on the well-established rule that a defendant's motion for acquittal admits "every conclusion favorable to the [state] that a jury might fairly and reasonably infer from the evidence" and the motion should not be granted "unless the evidence is such that no view which the jury may lawfully take . . . can be sustained under the law." *Lynch v. State,* 293 So.2d 44, 45 (Fla. 1974).

Owen has filed two pro se briefs, in addition to the briefs filed by his counsel. Most of the issues raised duplicate those raised by appointed counsel, but one issue merits comment. Owen claims that his trial counsel, who is also serving as his appellate counsel, was ineffective. Although this issue is customarily handled in a 3.850 hearing, it may be raised on direct appeal under rare circumstances where it is preserved and the ineffectiveness is apparent on the face of the record. Refusal to address the issue under such circumstances would be a waste of judicial resources. No such circumstances exist here. *Blanco v. Wainwright,* 507 So.2d 1377, 1384 (Fla. 1987). Here, there is nothing on the face of the record even remotely suggesting ineffective assistance of trial counsel and appellant repeatedly expressed satisfaction with trial counsel's performance in response to queries from the trial judge. What concerns us is not only that appellant makes such an assertion concerning his current appointed counsel, but also his apparent belief that he is entitled to independently defend his case by submitting pro se briefs without reference to the actions of his appointed counsel. On remand, assuming retrial, the trial judge is directed to clarify this situation and make the appellant aware of *Faretta v. California,* 422 U.S. 806 (1975), and his choices thereunder. We reverse all convictions and remand for retrial.

It is so ordered.

OVERTON, McDONALD, SHAW and KOGAN, JJ., Concur

BARKETT, J., Concurs specially with an opinion, in which KOGAN, J., Concurs

GRIMES, J., Dissents with an opinion, in which EHRLICH, C.J., Concurs

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

BARKETT, J., specially concurring.

I concur in the decision to reverse because the interrogation subsequent to appellant's assertion of his right to remain silent was improper. As the *Miranda* Court stressed: "If the individual indicates *in any manner,* at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-74 (emphasis added). And, as the Court later explained in *Michigan v. Mosley,* 423 U.S. 96, 104 (1975), the admissibility of statements obtained after a person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was "scrupulously honored." In this case, it was not.

KOGAN, J., Concurs

GRIMES, J., dissenting.

I must respectfully dissent from the holding in this case and that portion of the majority opinion concerning the *Miranda*[2] issue. I do not believe that current case law requires police to cease questioning a suspect simply because, as happened here, the individual expresses some reluctance to confront the details of his crime. Nor do I believe in the context of the extended series of interviews between Owen and police that his two statements — "I'd rather not talk about it," and "I don't want to talk about it" — must be construed as a request for a lawyer or a request to cut off questioning.

Initially, several points need to be emphasized. As the majority touched on its discussion of the first issue, the police questioning of Owen was totally lawful. Often he initiated contact. None of the interview was especially long; Owen never complained about the questioning and never

---

2 *Miranda v. Arizona,* 384 U.S. 436 (1966)

directly halted a session. The interviews were brought to a close by the officers, apparently when they felt Owen had told them all he would tell them in that session. The officers' conduct was in no way coercive, though they did attempt to persuade Owen to confess. Owen was not browbeaten or threatened with anything other than the probability that criminal charges would be brought against him. Prior to all sessions, he waived his *Miranda* rights, including the right to consult a lawyer and to have one present.

The two statements Owen made must be seen in the context not only of the conversation during which they occurred but also of the relationship that had built up between Owen and the two policemen who did most of the questioning, Lieutenant Kevin McCoy, Boca Raton Police Department, and Officer Mark Woods, Delray Beach Police Department. This series of interviews was a long cat-and-mouse game between Owen and the detectives; indeed, the game may have begun with the killings.[3] Often he would appear ready to talk about the murders, only to change the subject.

The portrait of Owen that emerges from these interviews is of a person who wanted to impress the officers with his cunning, and with his skill as a criminal. He even alleged that he had taken criminology and crime scene analysis courses at a college while in Michigan. He never exhibited

---

3 For example, the Delray Beach victim was stabbed to death and a hammer was found beside here, while the Boca Raton victim was killed by multiple blows with a hammer, a knife being found nearby. While in jail, Owen wrote rhymes that seem intended to tantalize the officers. One went: "Roses are red, white, yellow and pink. To play my game you've got to think." Also, one detective asked Owen to fill in a blank with the number of murder victims. Owen deflected the question but, he said later, drew a square on his styrofoam coffee cup and filled in the number two while he talked. The officer had not noticed the cup.

any reticence in admitting criminal acts generally,[4] and never indicated any desire to speak with an attorney. It is clear from reading the record that Owen did not mean he had changed his mind about talking to police and that he wished to speak with a lawyer before continuing. His comments are those of someone who does not want to face the truth, not someone who seeks legal counsel.

*Long v. State,* 517 So.2d 664 (Fla. 1987), *cert. denied,* 108 S.Ct. 1754 (1988), which the majority cites for authority, involved a statement: "I think I might need an attorney." The United States Supreme Court has required an immediate cessation of interrogation upon any request by the defendant for an attorney. *Edwards v. Arizona,* 451 U.S. 477 (1981). However, with respect to a suspect's terminating an interrogation where no request for counsel is involved, that Court has said that "[t]hrough the exercise of his option to cut off questioning, he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." *Michigan v. Mosely,* 423 U.S. 96, 103-04 (1975).

In *United States v. Thierman,* 678 F.2d 1331 (9th Cir. 1982), the court considered the validity of a confession made to the police after the defendant had earlier asked, "Can we talk about it tomorrow?" The court said:

> Twice Thierman was advised of his *Miranda* rights and each time he agreed to answer some questions and refused to answer questions on certain topics. A person in custody may selectively waive his right to remain silent by indicating he will respond to some questions, but not to others.

---

4 In fact he admitted, and showed no remorse for, numerous instances of drug abuse, several unreported break-ins, and one incident of "flashing" a young woman on the campus of Florida Atlantic.

*United States v. Lopez-Diaz*, 630 F.2d 661, 664 n. 2 (9th Cir. 1980); *United States v. Lorenzo*, 570 F.2d 294, 297-98 (9th Cir. 1978). . . .

> The only other event relevant to whether Thierman invoked his right to remain silent occurred when he inquired "Can we talk about it tomorrow?" The district judge was not required to interpret Thierman's questions as an invocation of his right to remain silent. The question is more easily construed as a mere request to postpone interrogation on a single subject than an outright refusal to answer any more questions.

*Id.* at 1335-36. The Eleventh Circuit Court of Appeals in *Martin v. Wainwright*, 770 F.2d 918 (11th Cir. 1985), *modified*, 781 F.2d 185, *cert. denied*, 479 U.S. 909 (1986), disagreed with *Thierman* to the extent that it held that the defendant's statement, "Can we wait until tomorrow?" constituted an invocation of the right to cut off questioning. However, that court did not dispute the *Thierman* court's premise that the defendant's election to remain silent on a single subject does not necessarily require that the interrogation be completely terminated. In fact, the court in *Martin* distinguished *Thierman* by pointing out that in that case the surrounding circumstances "indicated that the suspect's request concerned a particular subject matter and not the interrogation in general." *Martin*, 770 F.2d 924 n. 6.

It seems to me that the instant case is closer to *Thierman*. When Owen made has first statement that the majority finds objectionable, Lieutenant Rick Lincoln, a newcomer to the interview, was talking to him about the similarities between the Boca Raton murder and the one in Delray Beach, while showing him the footprint he left behind in Delray Beach.

OFFICER LINCOLN: . . . . Duane, this is you. This stuff proves it's you.

THE DEFENDANT [OWEN]: Yeah, it looks identical to me.

OFFICER LINCOLN: Sure, it is.

Tell me about it for you, Duane.

I think you need to.

I know you want to.

. . . .

Yeah, you're right, this is you.

When did you first see her?

Now is the time, Duane.

We can't have stuff on this thing.

OFFICER WOODS: It's good enough.

I know what you're thinking.

THE DEFENDANT [OWEN]: That's it, man.

OFFICER WOODS: You're taking a look at it and you're checking it out

THE DEFENDANT [OWEN]: Yeah.

OFFICER WOODS: And that's it. That's the bottom line.

OFFICER LINCOLN: Satisfy yourself right now.

There's a few things —

OFFICER WOODS: Yeah.

OFFICER LINCOLN: — that I have to know, Duane.

A couple pieces of the puzzle don't fit.

How did it come down?

Were you looking at that particular house or just going through the neighborhood?

THE DEFENDANT [OWEN]: I'd rather not talk about it.

OFFICER WOODS: Why?

OFFICER LINCOLN: Why?

You don't have to tell me about the details if you don't want to if you don't feel comfortable about that.

Was it just a random thing?

Or did you have this house picked out.

That's what I'm most curious about.

Things happen, Duane.

We can't change them once they're done.

THE DEFENDANT [OWEN]: No.

OFFICER LINCOLN: But you can sure make it easier on two pa-rents that need to know.

OFFICER WOODS: And a whole town full of babysitters that are afraid to go outside.

That's how the kids make their money in the summer.

OFFICER LINCOLN: Had you ever been to that house before?

THE DEFENDANT [OWEN]: That was a big scene over there.

At this point the conversation shifted, with the officers trying to find out if Owen had known the victim or the family for whom she had been babysitting and how long it had taken him to get into the house. They interspersed these questions with statements flattering Owen and with demonstrations of how evidence was sufficient to convict him.

Finally, Owen said he had not been to the murder scene and the subject shifted to where his bicycle had been left:

THE DEFENDANT [OWEN]: How do you know I even had a bike?

You don't even know that .

OFFICER LINCOLN: You tell me you didn't have a bicycle.

See, you won't lie, Duane.

I know you won't lie when you are confronted with the truth.

Now, are you going to tell me you didn't have a bicycle?

I know that much about you now.

You play by the rules. Those rules are important.

We all need rules.

Now did you have a bicycle? Of course, you did.

THE DEFENDANT [OWEN]: I don't want to talk about it.

OFFICER LINCOLN: Don't you think it's necessary to talk about it, Duane?

Two months have gone by already, Duane.

That's a long time. It's a long time for people to work. It's a long time for you to hold it within yourself. It's a long time for people to wonder.

. . . .

OFFICER LINCOLN: I won't make you tell me something you're not comfortable in talking about, Duane.

But I do want to know some of the things that shouldn't hurt that much to talk about.

What you did with the bicycle. How long you were outside the house. Those kind of things.

I know what you're reluctant to talk about and I won't press you on that.

THE DEFENDANT [OWEN]: I don't see what them kind of things got to do with it anyway.

OFFICER LINCOLN: It's all part of the crime, Duane.

And I know you're uncomfortable about talking about certain aspects of it, and I respect that.

Do you know what time it was when you first got to the house?

Do you remember?

OFFICER WOODS: What time was it, Duane?

THE DEFENDANT [OWEN]: Let me take — use the bathroom, first.

OFFICER WOODS: Sure. I have to also.

It is not perfectly clear what Owen meant by his comments, but it is clear from a totality of the circumstances that he did not want to quit talking to the officers about the crime. While the police in this case did not immediately cease questioning Owen on the two topics he indicated a reluctance to discuss — whether the house had been premeditated and where the bicycle had been left — their follow-up questions can fairly be seen as attempts to determine what Owen did mean. In any event, Owen did not make meaningful responses to these inquiries and the discussion shifted to other aspects.

Owen's attitude toward the questioning can be seen graphically in the circumstances surrounding the actual confession. When the questioning reconvened from the break, Officer Woods left to get coffee, leaving Owen and Lieutenant Lincoln alone. Owen mentioned the possibility of visiting with his brother, commented on the fact the he would get bad publicity for facing two counts of first-degree murder, and asked about the possibility of unrelated minor charges being field against him.

OFFICER LINCOLN: I have no idea. See, I'm talking about a homicide here. I don't know about all that other stuff. That's what we're dealing about tonight.

THE DEFENDANT [OWEN]: How come you don't carry around this big briefcase full of bullshit like he [Woods] does?

OFFICER LINCOLN: I don't think I need to, do you?

THE DEFENDANT [OWEN]: No.

OFFICER LINCOLN: I think we're talking about something. We're talking about an event that took place. I know about it because I was there. You know about it because you were there. So why do I need a big sheaf of papers? We're both intelligent people with memories, am I right? How long were you outside the house, Duane? Hours? Minutes?

THE DEFENDANT [OWEN]: You guys got me good, man.

OFFICER LINCOLN: Yeah.

THE DEFENDANT [OWEN]: Yeah. I knew it, too.

OFFICER LINCOLN: Did you?

THE DEFENDANT [OWEN]: Yep. As soon as they asked me for footprints.

These excerpts show two things: First, that the conversations were two-way transactions, with both the officers and Owen trying to gather information. Owen was trying to learn how good a case the police had. Second, and more importantly, they show that Owen did not wish for questioning to cease; indeed, he wished for it to continue until he had made up his mind to end the game. It should be noted that his confession was not triggered by a particularly insightful or accusatory question. It is also important that this confession was hardly different from any other that Owen gave as to lesser crimes. There was no emotional breakdown, simply a statement of fact.

Under these circumstances, I would uphold the trial judge's denial of the motion to suppress which comes to us with a presumption of correctness. I believe that Owen's comments can fairly be understood as intending only to cut

off questioning on a particular subject and not a request to terminate questioning in its entirety.

EHRLICH, C.J., Concurs

An Appeal from the Circuit Court in and for Palm Beach County,

Richard B. Burk, Judge — Case No.84-4014-CF A02

Theodore S. Booras, West Palm Beach, Florida; Michael Salnick and Barry E. Krischer of Salnick & Krischer, West Palm Beach, Florida; and Duane Eugene Owen, in proper person, Starke, Florida,

for Appellant

Robert A. Butterworth, Attorney General and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, Florida,

for Appellee

## TRANSCRIPTS FROM THE TRIAL

The trial court's findings and rulings on Appellant's Motions to Suppress. Record Excerpts pp. 1422-1445.

**THE COURT:** I will point out also that as I began this week, having reviewed the Miranda decision, I was clearly of the opinion that, "I don't want to talk about it," or, "I rather not talk about it," was an automatic triggering device, which, at that point, precluded further discussion with the confessant, absent some reinitiation by the confessant, separate and apart from any inquiry by law enforcement or people in that category.

The cases that have been furnished to me by the State, as well as the one furnished by the defense, although furnished from a different viewpoint or contention, convince me that the demand for an attorney may be automatic triggering device, and probably still is under Miranda.

But that the, "I don't want to talk about it," or that the, "I rather not talk about it," are matters which have to be examined in context. And once examined in context, then the determination has to be made as to whether or not they are equivocal, which would warrant law enforcement to making further inquiry to ascertain the equivocation and then with regard to that determination, once again, according to the case law that has been furnished to me, there must be a scrupulous adherence to the confessant's right to remain silent with regard to the matters being addressed.

I pointed out to you earlier today, and it is part of my discussion with you now, the matters that I had reviewed, I will not enumerate those items. But I will add to that litany the cases that the State has delivered to me, which I have now reviewed during the noon hour, that first of all the *Puccio v. State,* out of the First District in 1983, 445 S.2d 419. The *Breedlov v. State,* out of the Florida Supreme Court

in March of '82 at 413 S.2d on Page 1. *Sonny Boy v. State,* out of the Supreme Court of the State of Florida, February of '84, 446 S.2d Page 90. *State v. Beck,* out of the Third District in 1980 at 390 S.2d 748. *Harley v. State,* 407 S.2d at 382. *Harris v. State* out of the Supreme Court of the State of Florida, 1983, 438 S.2d 787.

*Barneson v. State,* out of the Third District in 1979, 371 S.2d at Page 680. I have not Shepardized any of these cases. I am relying upon both the State and the defense for representations in having furnished these cases to me that they are valid decisions which have not been overruled or superceded by some following case.

I began these proceedings being concerned about Mr. Owen's statement that he didn't want to talk about it, that he rather not talk about it. The contrast in speed between Sergeant, now Lieutenant McCoy and Sergeant Woods are similar, but Captain Lincoln's speed is more rapid than either of the two officers named.

A great deliberation for me is the issue of whether or not there was a scrupulous adherence to the right to remain silent once involved, if in fact it was invoked.

With regard specifically to the Slattery matters, which have been argued at great length by the State, with great emphasis placed on them, I have been encouraged by both the State and the defense to consider all of these matters in totality.

I pointed out to Mr. Owen at the beginning of this week that I felt that I knew him, certainly better than he knew me, by simply having observed him during some 20-some-odd hours of tapes.

Certainly the same relates to Officer McCoy, Officer Woods, and Officer Lincoln.

I have previously ruled, and reaffirmed that ruling with regard to the original arrest, that it was certainly on probable cause. I have denied at the earlier part of this week the defense motion with regard to that issue, the issue of free and voluntary, the threshold issue of the free, voluntary nature of the — all of the statements based upon my review of the tapes, of the testimony that has been presented in Court, as it relates not only to the video tapings, but also the original statements that were made orally to the officers back on the 30th of May and June, the first part of June, before they were video taped.

It is my determination that those rights were properly given to Mr. Owen to the point that after viewing the tapes and even hearing at one point the suggestion by Mr. Owen that either the officer or Mr. Owen could do them from memory, a factual finding by the Court at this time, therefore, is that the rights were appropriately advised to Mr. Owen; that he fully understood the right that we refer to as the Miranda rights, which are actually the constitutional rights that Miranda defines the proper procedure for giving.

And further, that he freely and voluntarily talked with law enforcement throughout the course of these proceedings, insofar as it relates an understanding that he had a right to remain silent, and what would happen if he didn't, and that he had the right to have a lawyer, and that one will be made available for him at state expense.

* * *

A factual finding by me at this time is that there was no physical coercion, there was no physical duress on Mr. Owen. There are not threats of violence on him. There were no suggestions of violence to him, in my observation of the tapes; he was in the room that he was in, in the corner that he was in, because that is where the television camera was pointed. I did not find during my entire viewing of the tapes any discomfort, although I would have been uncomfortable

if I had been siting in one of those metal chairs, but I found no discomfort or any other people sitting on those chairs, even though they were in them, what would seem to me, for a long period of time. I found, as a matter of fact, no preclusion of the normal bodily functions, either eating or sleeping or rest room facilities being denied to him that would place him in a physically discomforted position.

I further find, as a matter of fact, with regard to these matters, that a substantial portion of the discussions between Mr. Owen and law enforcement were at Mr. Owen's request, or invitation, and that even applies to the session when Mr. Owen was read the Probable Cause Affidavit, I believe, with regard to the Worden homicide, that Mr. Owen had requested the officers that should charges be filed, that he be advised. And it was in compliance with that request that the officers scheduled a meeting with Mr. Owens and read him that Probable Cause Affidavit.

As a finding of fact, I view throughout the discussions an intelligent and astuteness on Mr. Owen's part with regard, not only the legal ramifications of what he was doing, but also a complete continuation of what he referred to as maneuvers, or what can be put in the context of somebody who does not become a policeman, but is enamored enough with that activity to take up the opposite of that as a challenge or as a competition. It has been referred to as a game by the officers. I don't recall specifically whether or not it had been referred to as a game by Mr. Owen, but clearly it was a mental activity on Mr. Owen's part, as law enforcement.

But Mr. Owen's inquiries, as a finding of fact at this time, were a constant test to law enforcement, to see whether or not law enforcement had dotted the "I's" and crossed the "T's" with regard to the matters that Mr. Owen was involved in.

My finding of fact with regard to Mr. Owen's statements with regard to the more serious of his offenses are that he placed a higher challenge or a higher goal on getting the information with regard to those than he did with regard to the lesser charges against him, and as a necessary corollary he required of law enforcement a higher standard or a higher burden with regard to the proof to him of those particular issues.

As a factual determination made by me at this time, Mr. Owen was clearly aware of — is still aware of the penalties involved in the charges that are involved in his cases. That was clear during the taped interviews. It was clear during the testimony that has been presented with regard to this week's hearing.

* * *

[I]t is clear and convincing to me that there was no physical discomforture foisted upon Mr. Owen with regard to these matters. There was no threat of physical violence or any threats of any kind. There were no problems as acknowledged by Mr. Owen, and as acknowledged by the law enforcement officers. There was no suggestions that we are going to get you a better deal. Everybody was straight up front with each other.

Mr. Owen, through his discussions with the officers, I believe was straight up front with them to the extent that if you can prove it to my satisfaction, I will discuss the matters with you. But that was the challenge that he placed to them, and upon receiving the necessary input back to him as to what they had done, that he determined whether they had met his burden, and if they had, then he'd discuss the matters with them. He deliberately tested them and sent them on some wild goose chases for the purposes of seeing if they were doing what he expected them to be doing when the results came back in and he weighed and evaluated those very carefully. If I had seen, as the State has positioned

the matter, if I had seen just the one tape with regard to what has been designated now, I guess, as the Delray Beach, I guess the case where the Karen Slattery matter occurred, in Delray, if there had been just one tape by itself, it would have been substantially different. It is not the one tape by itself. If Captain Lincoln had been doing all of the inquiries, I don't know that the same result would have come about. But at least contrast between Captain Lincoln and Lieutenant McCoy would not have been as substantial as it was.

I pointed out previously and make the factual finding of fact at this time that Lieutenant McCoy's approach was unquestionably laid back.

You have referred to that as the friend or good-guy approach, Mr. Krischer, with regard to those matters. I don't find anything in the cases that addresses itself to prohibiting that type of inquiry.

I have gone back and I have looked at the Miranda decision again, and although they talk about the Mutt-and-Jeff and the false-friend as a determination of law, I do not find that that is precluded.

* * *

I may be completely misjudging Lieutenant McCoy, but I don't believe so. There is no question but that he arrived to talk to Mr. Owen as a law enforcement officer. Neither he nor Mr. Owen had any question in their mind but that that was the case. But I believe that Lieutenant McCoy had an earnest interest that we have referred to here of having on the hat of either the prison confessor or the bartender. I think he had an earnest interest in assisting Mr. Owen in getting some of these matters off of Mr. Owen's chest, separate and apart from — and certainly subordinate to his activity as a law enforcement officer in getting these statements.

He certainly did not come in and say, "If you want to confess, I will hear your confession, and I will not use it for anything." I don't believe he had to, under the circumstances, acknowledge to Mr. Owen that Lieutenant McCoy was in fact a law enforcement officer, and the challenge was there. Had he been a priest, Mr. Owen would not have talked to him. The charge was not to test the priest. The charge was to test the law enforcement officer to see if he came up with the right answers to the questions, in effect, Mr. Owen had presented to him.

* * *

Now, with the difficulty coming into these hearings that I have had during these hearings, is the matter with regard to whether or not the discussions should have been terminated once Mr. Owen says, "I don't want to talk about it." Once he said, "I rather not talk about it," those matters, by a preponderance of the evidence, to me, would not give me as much difficulty, perhaps, if Captain Lincoln had more patience with — had more patience with regard to these inquiries than to wan to address them with the rapidity in which he did. I believe with regard to his inquiry, that may be pointed out, or pointed up so much simply because of the contrast between his approach and that of Lieutenant McCoy. But my view of these tapes leads me in my determination by a preponderance of the evidence to follow what the State has posited; she may not have put it in exactly those words, but I think two things problemed Mr. Owen with regard to those matters when he said, "I don't want to talk about it. I rather not talk about it."

I will say at the outset I do not believe that he was problemed or concerned in any way attempting to consciously or subconsciously to invoke his constitutional right to remain silent. I think what he was doing was twofold: Number one, he was weighing, he was being pushed more rapidly than he had been pushed with regard to the previous

matters to make a decision with regard to whether or not: "We have got enough here to convict you, Duane Owen." He was weighing those matters.

As I recall that tape, he got back into a great deal of consideration and discussion; he had his socks on at the time that he was supposed to have walked through that blood, and he had a puzzled situation as to how that print would have been left if he had his socks on . That wasn't discussed on the tape, but that was a problem that was puzzling Duane Owen. So he was equating, he was sifting, he was running through his mental computer the evidence that had been presented to him. And without doubt, and perhaps on equal plane with that was his simple, although Anglo-Saxon-worded statement, "You just don't confess to shit like that," which placed the significance of it in his mind, and it was not in my determination at this time an effort to exercise, although I am certain that there can be people who can view that tape dispassionately as I have tried to do, that may come to a different conclusion.

I believe that he was weighing other matters separately apart from any articulated or unarticulated exercise of the right to remain silent.

The case law that you furnished to me is replete that it doesn't — that you don't view it from a standpoint of a legal scholar whether or not that exercise has been made. The person doesn't have to be a lawyer to phrase the statement, "I want to exercise my constitutional right to remain silent." These cases are replete with that. I don't believe that is what he was doing; I don't believe that he was even attempting to exercise the right to remain silent with regard to those issues. I think he was computing, he was being pushed, unlike Lieutenant McCoy, Captain Lincoln was pushing him to make a decision, and that is not the way Duane Owen operated throughout these proceedings. He wanted to take

his pencil and paper; he wanted to go back and calculate; he wanted to determine in his mind what these people have, the evidence.

I believe that he ultimately determined in his mind, more rushed than he would like to have been, that he did, in fact, have that to the point that he decided to talk about it, and did, in fact, talk about it.

These matters that I have indicated here on the record, coupled with the recitation with regard to these matters what I have reviewed will constitute my finding of fact with regard to these taped statements as well as to those that were not taped.

All the matters addressed by the Motion to Suppress are being denied by me at this time based upon a finding of fact and conclusion of law that I have neither eloquently nor, perhaps, in logical sequence laid out for you.

(2)

No. 90-231

In The

# Supreme Court of the United States

October Term, 1989

STATE OF FLORIDA,

*Petitioner,*

v.

DUANE EUGENE OWENS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Florida**

## RESPONDENT'S BRIEF IN OPPOSITION

THEODORE S. BOORAS, ESQUIRE
Counsel of Record

Barnett Centre
625 North Flagler Drive
Suite 508
West Palm Beach, Florida 33401
(407) 832-0080

*Counsel for Respondent*

August 31, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

I. Whether the established and accepted rule of law holding that when a suspect makes an equivocal request to remain silent police must either cease questioning or clarify the request, should be abandoned?

II. Whether the Supreme Court should grant discretionary review because of a conflict between two Circuit Courts on an issue totally unrelated to the instant cause?

TABLE OF CONTENTS

# AUTHORITIES CITED

Page

## CASES CITED



## CONSTITUTION

## REASONS THE PETITION SHOULD BE DENIED

1. **The Florida Supreme Court correctly held that law enforcement's conduct in not honoring the Respondent's invocation of his right to remain silent violated the Fifth Amendment.**

The Fifth Amendment requires police to immediately cease an interrogation once a suspect indicates in any manner, at any time during questioning that he wishes to remain silent. *Miranda v. Arizona*, 384 U.S. 436 (1966); reaffirmed in, *Michigan v. Mosley*, 423 U.S. 96 (1975). In the instant case, the Respondent's Fifth Amendment rights were grossly violated. At several points during the twenty-four hours of videotaped interrogations, the Respondent indicated that he wished to remain silent.

> Appellant: Hey, between me and you, it seems to me that I shouldn't have to make a confession even though I – even if I did do it. You know what I mean?
>
> Officer Woods: Why (A-4).
>
> * * *
>
> Officer McCoy: Okay. You don't want to talk about them?
>
> Appellant: About which ones?
>
> Officer McCoy: The one that you did that you didn't get caught for.
>
> Appellant: No reason to, no.
>
> Officer McCoy: Why?
>
> Appellant: Why should I?
>
> Officer McCoy: Because you want to, because you want to tell me about them.

Appellant: I don't know. (A-6).

* * *

Appellant: You're up here and I ain't talking about it.

Officer McCoy: Are you going to?

Appellant: Nope.

Officer McCoy: Why not? Why not?

Appellant: I don't know.

Officer McCoy: Is it because you are afraid or you don't want to remember or what? What's the reason? Give me a reason?

Appellant: I've got to figure it out myself, you know.

Officer McCoy: Okay. Let me ask you something. We'll get off that for awhile. Then we'll come back to it, O.K.? But we'll get off of it for awhile . . . (A-9).

* * *

Officer McCoy: What are we going to do with Georgiana Warden? What are we going to do about that?

Appellant: There ain't much to do about it, chief. (A-10).

* * *

Officer McCoy: Do you want to talk anymore?

Appellant: No, because you've got to get back over there and I really ain't got nothing to say anymore. (A-12).

* * *

Officer Lincoln: Were you looking at that particular house or just going through the neighborhood?

> Appellant: I'd rather not talk about it.
>
> Officer Woods: Why?
>
> Officer Lincoln: Why? You don't have to tell me about the details if you don't want to, if you don't feel comfortable about that. Was it just a random thing? (A-14).
>
> * * *
>
> Officer Lincoln: Now, where did you put it?
>
> Appellant: I don't want to talk about it.
>
> Officer Lincoln: Don't you think its necessary to talk about it, Duane? Two months have gone by already. (A-30).

As detailed above, the Respondent several times indicated his desire to discontinue the interrogation; however, his invocation fell upon deaf ears as the police totally disregarded the Fifth Amendment's guaranteed protection. The above statements by the Respondent, must be viewed as an unequivocal invocation of his right to remain silent. In *U.S. v. Poole*, 794 F.2d 462 (9th Cir. 1986), the Court held that the interrogation should have ceased after the suspect said that he had, "Nothing to talk about." In *California v. Carey*, 227 Cal.Rptr. 813, Cal.App.3d 99 (2d Dist. 1986), cert. denied, 479 U.S. 1089 (1987), the Court held that the suspect's statement, "I ain't got nothing to say," was an unequivocal invocation of his right to remain silent. In *Christopher v. Florida*, 824 F.2d 836 (11th Cir. 1987), the Eleventh Circuit held that the statement "I got nothing else to say" was an unequivocal invocation of the accused's right to remain silent.

> For, as the Court stated in *Mosley*, the underlying purpose of the right to cut off questioning is to give the suspect control over "the time at

> which questioning occurs, the subjects discussed, and the duration of the interrogation", so as to "counteract the coercive pressures of the custodial setting." *Mosley*, 423 U.S. at 103-04, 96 S.Ct. at 326. Allowing a suspect to control the timing of an interrogation through his ability to "initiate" it serves this purpose; permitting the police to continue a custodial interrogation despite a request to stop in hope that the suspect will eventually ask a question does not. *Id.*, at note 22.

In the instant cause, although the Respondent repeatedly stated that he did not want to talk about the homicide, the police continued with their interrogations which directly violated the Fifth Amendment.

At one point when the Respondent stated that, "I ain't talking about it," Officer McCoy stated that, "We'll get off that for awhile, then we'll come back to it" (A-9). The practice utilized by this officer violated the *Mosley* rule which requires more than a switch of subjects after an invocation of the right to remain silent. *Mosley* mandates a total termination of the interrogation. *Michigan v. Mosley*, supra; *Martin v. Wainwright*, 770 F.2d 918, 924 (11th Cir. 1985), modified, 781 F.2d 185, cert. denied, 479 U.S. 909 (1986); and *Anderson v. Smith*, 751 F.2d 96, 103 (2d Cir. 1984).

Not only did the police violate the Respondent's Fifth Amendment rights by failing to "immediately cease" the interrogation, but they also violated the Fifth Amendment by questioning the Respondent as to why he wished to not talk about it.

> Officer Lincoln: Were you looking at that particular house or just going through the neighborhood?

> Appellant: I'd rather not talk about it.
>
> Officer Woods: Why?
>
> Officer Lincoln: Why? (A-14).
>
> * * *
>
> Officer Lincoln: Now, where did you put it?
>
> Appellant: I don't want to talk about it.
>
> Officer Lincoln: Don't you think its necessary to talk about it, Duane? Two months have gone by already. (A-30).

Inquiry as to why a suspect wishes to remain silent is an impermissible interrogation, not lawful clarification as argued by the State. *Christopher v. Florida*, supra; *U.S. v. Lopez-Diaz*, 630 F.2d 661, 665 (9th Cir. 1980); see also, *U.S. v. Johnson*, 812 F.2d 1329, 1331 (11th Cir. 1986); and, *Anderson v. Smith*, supra.

Once the Respondent invoked his right to remain silent, the police not only ignored his request, but they also sought to wear down his resistance over the many hours of continued interrogation. This Court has held that following an invocation of the right to remain silent, the interrogators may not attempt to wear down the suspect's resistance and make him change his mind. *Michigan v. Mosley*, supra at 105-06.

Even if the Respondent's statements were an equivocal indication of his desire to remain silent, the police could have only made a clarification. *Christopher v. Florida*, supra at 843-44; *Martin v. Wainwright*, supra at 924, (further questioning must be limited to clarifying the equivocal request); *Anderson v. Smith*, supra at 103; and, *U.S. v. Lopez-Diaz*, supra at 665. The *Christopher* court held:

> The rule, however, permits 'clarification', not questions that, though clothed in the guise of 'clarification', are designed to, or operate to, delay, confuse, or burden the suspect in his assertion of his rights. Because such questions serve to keep the suspect talking, not to uphold his right to remain silent, they constitute unlawful 'interrogation', not permissible clarification. *Christopher*, at 342.

Moreover, after the Respondent did invoke his right to remain silent, the police, in contrast to the State's position, continued to interrogate him on the very homicide that was the subject of the interrogation at the time of the invocation. There can be no doubt that the police violated the Respondent's right to cut off questioning; therefore, as the Supreme Court of Florida correctly held, all statements taken during the unlawful continued interrogation were inadmissible.

**2. The Florida Supreme Court's holding is totally unaffected by the conflict between the Ninth and Eleventh Circuits.**

While *Martin v. Wainwright*, supra; and *U.S. v. Thierman*, 678 F.2d 1331 (9th Cir. 1982), may conflict as to a limited issue, their holdings on that issue do not control this cause. Both cases dealt with suspects requesting to continue the interrogation on the following day. The *Martin* Court held that the statement "Can't we wait until tomorrow" was an equivocal invocation of his right to cut off further questioning, 770 F.2d at 923-24. The *Thierman* Court held that the statement "Can we talk about it tomorrow" was a request to postpone the interrogation

on a single subject, not an outright refusal to answer any more questions. 678 F.2d at 1336.

In the instant cause, the Respondent stated that, "I'd rather not talk about it" and "I don't want to talk about it," meaning that he did not wish to be interrogated on the Slattery homicide. On the other hand, *Martin* and *Thierman* indicated a desire to discontinue their interrogations until the following day. There exist absolutely no comparison between the Respondent's statement and those of *Martin* and *Thierman*.

The State failed to point out that several years after the *Thierman* opinion, the Ninth Circuit held that an interrogation should have ceased after the suspect said that he had "Nothing to talk about." *U.S. v. Poole*, supra at 466. This ruling was later cited by the Eleventh Circuit when it held that a confession should have been suppressed after the accused stated "then I got nothing else to say." *Christopher v. Florida*, supra at 840.

The statements by *Christopher* and *Poole* are in line with those of the Respondent. The Florida Supreme Court's holding that the Respondent's confession was obtained in violation of the Fifth Amendment follows, not only the precedent set forth by this Court, but also that of the Ninth and Eleventh Circuits. *Michigan v. Mosley*, supra; *U.S. v. Poole*, supra; and *Christopher v. Florida*, supra. On the other hand, the Florida Supreme Court's holding is totally unaffected by the limited conflict between *Martin v. Wainwright*, supra, and *U.S. v. Thierman*, supra.

This Court should not allow the State to use the limited conflict between *Martin* and *Thierman* as a vehicle

to obtain review. Although a legal debate between the two would be of interest, their holdings do not control the instant cause; thus, certiorari should be denied.

## CONCLUSION

For the reasons set forth herein, the Respondent, DUANE EUGENE OWENS, respectfully prays this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

THEODORE S. BOORAS, Esquire
Barnett Centre
625 North Flagler Drive
Suite 508
West Palm Beach, Florida 33401
(407) 832-0080
*Counsel for Respondent*

TABLE OF CONTENTS

The following are pages 134-37 of the supplemental record on appeal before the Florida Supreme Court.

Q You and me make some team fighting. Two bulls, right?

A Yeah.

The problem is I am just as stubborn as you are when you make up your mind.

Q I know. I know.

A Being if I did do that, I probably wouldn't confess anyway.

Q Why?

A Being if I did do it, why I wouldn't confess?

Q Mm-hmm.

A Because you just don't confess to shit like that, you know.

OFFICER WOODS: Why?

BY OFFICER McCOY:

Q Why? Tell me – tell me – tell me why.

The real reason. Tell me why you just don't confess to shit like that, okay.

Tell me why.

The real reason, Duane.

I don't want to hear about sentencing no more. I don't want to hear about plea bargains no more. I don't want to hear that, okay.

You may have a hard time with it because you win your mission, you win this, and you win your bells and you win this, okay.

I am not winning because I am the bull and you are the bull and we fight to the death, okay.

I'm not the winner. I am not the winner.

You are the winner. You are the winner, okay. You win. I don't win nothing, okay. You win, okay. Because you are free from it, pal, okay. Because you have a chance not to do it again, okay. Because there is kids out there that don't want to have to go through that again.

And you know why they don't? You know why?

Because you decided they are not going to do that no more. They are not going to go through that no more, at least not from you.

You decided that.

That was your decision, okay.

So, you win. You get the ultimate decision. You make the ultimate choice because you decided to stop.

Not because I stopped you. Not because I am a stronger bull than you, okay. Or maybe that I outlasted you or that – or that – or that you lost to me. You ain't losing to me, okay.

Yeah, we are both bulls. Yeah, we fuck with each other's heads a little bit over the last couple of days. Sure we did, okay.

You are the ultimate winner because you are free from it, man, okay.

And you made the decision that it's not going to happen again. That you can stop it.

Okay, you are the winner there, man, not me, okay.

The people are the winner, okay. that's who the winner is, okay.

But you made them the winners, not me, okay. Not me.

A Seems to me that –

OFFICER McCOY: I'm sorry, Mark, did you get with somebody to get us chow?

OFFICER WOODS: Oh, you want to eat? I was going to ask. What do you want?

THE DEFENDANT: It doesn't matter to me.

OFFICER McCOY: He says anything. Could you do that?

OFFICER WOODS: Sure.

OFFICER McCOY: Because we should – I am starved. He is starved.

As long as it's not fish.

(Inaudible.)

(Whereupon, Officer Woods left the room.)

THE DEFENDANT: It seems to me – you know, I am not guilty, but it seems to me that if –

OFFICER WOODS: Excuse me. You got a phone call.

OFFICER McCOY: Probably my wife.

Keep your thought, okay. Keep your thought. Don't let it run away.

(Whereupon, Officer McCoy left the room.)

(Whereupon, Officer Woods enters the room.)

THE DEFENDANT: Hey, between me and you, it seems to me that I shouldn't have to make a confession even though I – even if I did do it. You know what I mean?

OFFICER WOODS: You shouldn't have to?

THE DEFENDANT: No.

OFFICER WOODS; Why?

THE DEFENDANT: Because if he had it stuck in his heart that I did it so bad, then he should have to prove that I did it and he shouldn't be here asking for a confession because he should have enough proof against me to not even worry about it.

He should already have a confession of his

* * *

The following are pages 362-365 of the supplemental record on appeal before the Florida Supreme Court.

never going to get out.

Q Well, maybe not.

A There ain't no maybe's. I know. He ain't never going to get out if he's charged with that kind of stuff.

Q Well, whatever. Whatever. Okay?

But as it stands right now, without anything, okay, without anything for me to go on, I mean as far as, you know, that person's point of view or his – or what happened or black out or this or that or the other thing or self-defense or this or that, whatever.

The only alternative will be a premeditated murder. Maybe first-degree murder, yeah. That would be it.

And we get all the tests back and everything like that, I got nothing else to go with, yeah. That's going to be the charge. We'll have to deal with that later on.

Can you offer me anything?

A Well, no, not on that case, no.

Q What other case?

A Well, the other ones that I'm already here for, you know.

Q Uh-huh. I know about that.

A I admitted to them because I knew I did them.

Q Uh-huh.

Okay. and those were the only other ones you ever did in Boca Raton?

A No. I did a couple more of them, but mums the word on them.

Q Maybe for now.

A As a matter of fact, I don't think I ever did. I think that's about it.

Q No, they weren't.

A Huh?

Q I says they weren't, and I know that and you know that.

A Oh, yeah. I know it, too. Now, I remember.

Q The ones –

A Huh?

Q The ones I asked you about, you mean?

A Yeah. Oh, I didn't do them, you know, about them other ones, but I know the ones I did do that didn't get caught on them.

Q Okay. You don't want to talk about them?

A About which one?

Q The ones that you did that you didn't get caught for.

A No reason to, no.

Q Why?

A Why should I?

Q Because you want to, because you want to tell me about them. I don't know.

A No. They – they ain't such importance anyway.

Q You know why some – I know why some of them you don't want to talk to me about.

A Why?

Q Because a couple people got hurt a little bit. I know that.

A Oh, yeah. those are them ones that you was talking to me about the other day.

Q Uh-huh. Uh-huh, yeah.

That's probably why you don't want to tell me about them.

Okay. It's no big deal. They're alive.

Okay. They got a pop in the noggin or maybe or whatever, a stitch or two, but they're alive.

Okay. And that's probably why you don't want to tell me about them. Okay.

Because you talked to me about, before, that you're not a violent person.

Well, I know you got a temper. Obviously, you were in a fight up there or something like that.

So, yeah, you do have a little bit of a temper.

We all do. Nobody is completely non-violent, and that's why you don't want to tell me about them.

But I would be lying to you if I didn't think you were the guy that did it. I think – I think – I think you know that.

Or what it says to you, what it should say to you, if you have any conscience whatsoever, okay, or you're thinking about it, unless you were to say to me right here and now that you don't give a shit about hurting anybody, which I wouldn't – you know, I find that hard to believe that you could say that to me. Okay.

Uh, you got to realize that it's wrong to hurt people and you got to realize that because you started hurting people, okay, and you couldn't stop hurting people and maybe you didn't kill or maybe the other people didn't die before when you hurt them, okay, you got to realize somewhere in your own mind, okay, that it escalated to the point where now someone is dead because of that violence. Okay.

And yeah, that says to me why you don't want me to – why you don't want to talk about those other cases, okay, that I talked to you about, because – let

* * *

The following is page 880 of the supplemental record on appeal before the Florida Supreme Court.

about that later.

Uh, okay. That was the one lie you told me.

What was the other one?

THE DEFENDANT: Same lie that I told you I was going to talk to you about when you came up here. You're up here and I ain't talking about it.

OFFICER McCOY: Are you going to?

THE DEFENDANT: Nope.

OFFICER McCOY: Why not? Why not?

THE DEFENDANT: I don't know.

OFFICER McCOY: Is it because you're afraid or you don't want to remember or what? What's the reason? Give me a reason?

THE DEFENDANT: I've got to figure it out myself, you know.

OFFICER McCOY: Okay. Let me ask you something. We'll get off of that for a while. Then we'll come back to it, okay? But we'll get off of it for a while. But now your brother's got to go and he wants to just say good-bye to you before he goes. Okay?

Uh, remember we talked about the flashing when you flashed a little girl over at FAU?

Back, uh, the night Mary Lee Manley was hurt?

* * *

The following are pages 921-922 of the supplemental record on appeal before the Florida Supreme Court.

Like we had uniforms like this with buttons and stuff, regular pants and a zipper; blue uniform.

What I did was I – you know, I like to look sharp, man. So, I shined my shoes every day. Why else look like a bum. They had their pants legs rolled up and shit.

Q Okay.

A I don't know, you know. I wanted to look halfway decent.

Q So, did you have those sneakers from Ingrahm Medical Center until Dover Street and – when you parted your company?

A Yeah. I never really wore them that much because they were – they were too small.

Q Why would you buy shoes that were to small?

A See, at the time when I bought them, they felt fine. But then I started playing football and shit and, you know, and didn't want to take any chance on ruining them.

Q Do you wear heavy socks?

A Up there I did; yeah. I wore my green Armies.

Q What – what are we going to do with Georgiana Warden? What are we going to do about that?

A There ain't much to do about it, chief.

Q Okay. Mark's got a few questions for you about the camera shit you were talking about. You want to talk to him for a couple minutes?

A Yeah. Yeah. That'd be fine.

Q If you do remember anything else, I'll be around.

A All right.

As a matter of fact, maybe if you think about it when you walk by the coffee machine –

Q Oh, yeah. Yeah. I've done that before.

A Does that beeper work or what? Here. I noticed that before.

Q Yeah, here –

A Oh.

Q If they want me, they'll page me. I'll be back.

A (Witness nodded his head.)

(Whereupon, Officer McCoy left the room.)

(Whereupon, Officers Woods enters the room.)

THE DEFENDANT: What are you looking for?

OFFICER WOODS: The ashtray. What did you do with it?

THE DEFENDANT: Oh, uh, I think they hauled it out of here when they took the cigarettes and all the cups and shit.

* * *

The following are pages 965-966 of the supplemental record on appeal before the Florida Supreme Court.

you know, and everything because, you know, the case is being solved or whatever.

OFFICER McCOY: No. The case is solved.

THE DEFENDANT: Well, you know, it's still in – you know, still going. Let's just say –

OFFICER McCOY: Sweeping up the details.

THE DEFENDANT: Well, like it's still in process. It's –

OFFICER McCOY: Yeah.

THE DEFENDANT: You know, once it's over with and everything then you have nothing to work for anymore.

OFFICER McCOY: Who, me?

THE DEFENDANT: I mean on this case.

OFFICER McCOY: Well –

THE DEFENDANT: So therefore, you know, maybe down the road –

OFFICER McCOY: I might.

THE DEFENDANT: That's just – that's history.

OFFICER McCOY: I might. Because there are going to be other people talking to me about you, seeing what I think. Michigan's been talking to me and, you know, Lancing's been talking to me. A few other people. You know, so they'll always be something there. So, we may be seeing each other then, too, just to talk.

Do you want to talk anymore?

THE DEFENDANT: No, because you've got to get back over there and I really ain't got nothing to say anymore, you know. And all we've been doing is beating around the bush, you know.

What time is it anyway?

OFFICER McCOY: 4:00 o'clock, 4:15. I'll get you over there for chow. Why don't you hang tight.

(Whereupon, Officer McCoy left the room.)

(Whereupon, the foregoing-videotaped interview was concluded.)

The following are pages 1076-1096 of the supplemental record on appeal before the Florida Supreme Court.

* * *

looks like.

OFFICER LINCOLN: Yeah, you do.

Duane, this is you. This stuff proves it's you.

THE DEFENDANT: Yeah, it looks identical to me.

OFFICER LINCOLN: Sure, it is.

Tell me about it for you, Duane.

I think you need to.

I know you want to.

Like I say, I think I understand certain things about you.

This has – this has gone on for two months now.

In a lot of ways, it's a competition.

It's something where you match your wits like the little poem you just recited.

I give you all the credit in the world.

You are sharp.

See, but this stuff here says there was at least one mistake that you made.

Whether or not you made it intentionally, I am not convinced.

Yeah, you're right, this is you.

When did you first see her?

Now is the time, Duane.

We can't have stuff on this thing.

OFFICER WOODS: It's good enough.

I know what you're thinking.

THE DEFENDANT: That's it, man.

OFFICER WOODS: You're taking a look at it and you're checking it out.

THE DEFENDANT: Yeah.

OFFICER WOODS: And that's it. That's the bottom line.

OFFICER LINCOLN: Satisfy yourself right now.

There's a few things –

OFFICER WOODS: Yeah.

OFFICER LINCOLN: – that I have to know, Duane.

A couple pieces of the puzzle don't fit.

How did it come down?

Were you looking at that particular house or just going through the neighborhood?

THE DEFENDANT: I'd rather not talk about it.

OFFICER WOODS: Why?

OFFICER LINCOLN: Why?

You don't have to tell me about the details if you don't want to if you don't feel comfortable about that.

Was it just a random thing?

Or did you have this house picked out?

That's what I'm most curious about?

Things happen, Duane.

We can't change them once they're done.

THE DEFENDANT: No.

OFFICER LINCOLN: But you can sure make it easier on two parents that need to know.

OFFICER WOODS: And a whole town full of babysitters that are afraid to go outside.

That's how the kids make all their money in the summer.

OFFICER LINCOLN: Had you ever been to that house before?

THE DEFENDANT: That was a big scene over there.

OFFICER LINCOLN: You're not kidding.

OFFICER WOODS: Of course.

THE DEFENDANT: Made the papers and everything.

OFFICER LINCOLN: Nationwide.

THE DEFENDANT: A lot of people's mad about it too.

OFFICER LINCOLN: I don't think it's mad so much, Duane, as –

OFFICER WOODS: Scared.

OFFICER LINCOLN: Scared of something they can't control.

You know how you are in a situation you can't control, sometimes you are frightened.

I know I am.

That's what those people feel.

See, and they are going to have to know that they have no reason to be scared anymore.

Had you been to that house before, Duane?

THE DEFENDANT: That tells you right there.

OFFICER LINCOLN: I'll show you again.

THE DEFENDANT: That answers my question.

OFFICER LINCOLN: Before that night?

I know you were there that night.

Had you ever been there before?

It had to happen.

So you got to accept it.

OFFICER WOODS: Yeah.

It's all over.

And you were good too.

How much time did you spend in the house and look how little you left; one footprint and all the other stuff in the blood.

You wiped everything down real good.

We didn't get one latent, did we?

Was there any (indicating)?

OFFICER LINCOLN: No fingers.

OFFICER WOODS: Plenty of smudges, but that's from wiping stuff.

You didn't take your socks off.

OFFICER LINCOLN: You were outside for quite a while, I think.

OFFICER WOODS: Yeah.

OFFICER LINCOLN: How long?

You scouted it out good.

I know you did.

I saw your footprints – your sneaker prints out underneath the windowsill there in the front of the house.

I know you were ducked down there looking in.

How long did it take before you went in?

THE DEFENDANT: What sneaker prints?

OFFICER LINCOLN: Pictures, photographs.

See, we don't have any sneakers to compare them to, Duane.

The size is right. The size is your shoe size.

How long were you outside?

It's like you said, we got it right here. You're right. We got it.

THE DEFENDANT: What I don't understand is this right here (indicating).

OFFICER LINCOLN: I think we can get to that once we start talking.

I can explain that to you and you will remember.

Was that your first time at the house, Duane?

Talk to me.

I know you want to.

And you can see that this isn't bullshit. This is evidence. You are confronted.

Now, tell me.

OFFICER WOODS: Remember how the other night after when you told me you did that one on Fourth Avenue and you told me you faked me out.

I was the one that went to the hair salon and asked the people if Duane Owen got a haircut the next day.

And you fooled me and you got me good.

OFFICER LINCOLN: The time for fooling and everything else is over with.

OFFICER WOODS: But then you told me how you were slick and how you went about it.

You were good.

OFFICER LINCOLN: Sure.

OFFICER WOODS: I got to tell you.

And this one is even tougher, because you didn't touch anything with your hands.

Did you steal anything out of the house?

OFFICER LINCOLN: I'm going to tell you and I'm going to say it just one more time, because I'm getting tired of telling you how good you are.

My guys – we had about eight guys working on this case.

A lot of hours. Whole lot of hours.

And it all comes down to this two months later. Some footprints that you put inside definitely excludes all others. In the blood at the crime scene and all the other circumstantial stuff.

Which, that's all it is, circumstantial, I grant you.

The statements you've made. The accountability for your time and all the other things, but that coupled with this locks you in.

You're the man.

You know you're the man.

You wanted somebody to tell it to you, prove it to you and you got it.

Now, I think you've got the responsibility to be a man and live up to your end of the thing.

See, we've done our thing. We've gone as far as we can.

We're professionals.

But I have a couple questions still. I'm curious. That's why I'm asking you the questions.

And you can straighten them out for me.

Had you ever been to that house before?

Some of the guys think that you had and some don't.

THE DEFENDANT: Why do they think I had?

OFFICER LINCOLN: It's just their matter of choice.

Personally I don't think you had.

Was I right?

THE DEFENDANT: Why did you guys think there were two people in the house, or was that just to throw the papers off and the people?

OFFICER LINCOLN: You got to try to keep the press off guard because they can really damage your case sometimes too.

I saw it as one person all along.

You do your things alone.

You don't bring other people in. I know that.

That's your style.

THE DEFENDANT: Get snitched out, man, if you bring anybody else.

OFFICER LINCOLN: Sure.

OFFICER WOODS: And you don't tell anybody else either, sitting around bragging.

Some of the guys thought that whoever it was might have talked to her on the beach, because she did go to the beach.

It might have been somebody who worked around the beach; stuff like that.

Had you ever talked to her on the beach and she told you where she was or where she was babysitting or anything like that? Or were you just kind of going through the neighborhood and checking the places out and scoping around?

You had just gotten kicked out of the house. You needed some change, right?

OFFICER LINCOLN: How long did it take you?

THE DEFENDANT: No, I had plenty of money.

OFFICER WOODS: Yeah?

OFFICER LINCOLN: How long did it take you to get in, Duane?

OFFICER WOODS: You mean you did a lot of checking out before you went in, right?

A lot of looking around?

OFFICER LINCOLN: Duane, be a man about it now.

This is evidence.

The three of us are sitting here.

That's true.

This is – this is not a dream. This is not a hypothesis. This is something that's happened.

And the fact that you did this crime is something that happened.

It happened.

OFFICER WOODS: You can't change that.

OFFICER LINCOLN: But I do think you do have a responsibility too that you can recognize to try to make things right for the people in Delray.

That's a hell of a thing to do through life wondering.

And I think you're a bigger man than that.

By the fact you didn't harm those children, that tells me something about you, Daune.

THE DEFENDANT: She was a children. She was only fourteen.

OFFICER WOODS: She didn't look fourteen, did she?

THE DEFENDANT: Not in the paper, no.

OFFICER LINCOLN: Don't talk about the paper, Duane.

Let's talk about that night.

See, that's reality.

See, you can't dance around reality forever.

I know you've been wanting to talk about it.

I know you have.

I know this isn't easy for you to accept.

It's a mistake you made.

I don't think it's something you intended – intentionally did, but it happened.

I have given you something here, Duane. I think it's time you gave me something.

Because fair is fair and right is right.

How long did it take you to get into that house?

Was it something you took your time at?

Give me something, Duane.

I've given you something. Evidence.

This is stuff you recognize, because you are not a dummy.

See, I can't run bluffs by you. I know that.

That's why I came with evidence.

That's why we haven't talked to you directly until now.

But the time has come.

THE DEFENDANT: Yeah.

OFFICER LINCOLN: We're not going to keep running around this thing here.

Now, how long did it take you to get into the house?

THE DEFENDANT: You know what's so strange about this whole think, you know, is that, you know, like this here could have been, you know, taken right off this picture here. Right off the piece of paper that I made up today, you know.

OFFICER WOODS: Duane, that's the kind of cards I used when I was in crime scene for lifting latent fingerprints, Duane.

OFFICER LINCOLN: This is evidence, Duane.

OFFICER WOODS: I can't see you bringing this up here either, Rick.

OFFICER LINCOLN: I wanted him to see it.

OFFICER WOODS: You could have taken a picture of it or something.

OFFICER LINCOLN: Hey, this is it.

This is the way that it comes.

I think it's time you gave this stuff up, Duane.

This is the way that it is.

This is not somehow gee, maybe Duane Owen did it.

Duane Owen did it!

OFFICER WOODS: It ain't like there was an eyewitness to it or nothing, but that's just as good, you know.

OFFICER LINCOLN: I've been clean with you and I showed you what I have.

THE DEFENDANT: Mm-hmm.

OFFICER LINCOLN: I think it's time you gave me a little bit back.

Did you know Mr. and Mrs. Helm (phonetic) who owned the house there?

Had you ever seen them before?

OFFICER WOODS: Had you?

The game is over, Duane.

You know there's no more – there's no more nip and tuck and chase and hunting and fishing and checking us

out. Because you did. And we came through. We found something. Something solid.

It's no more game.

What are you thinking about?

A lot of stuff bouncing around in there.

OFFICER LINCOLN: Had you ever been there before, Duane?

THE DEFENDANT: I was just trying to think of –

OFFICER WOODS: Think of a way out?

THE DEFENDANT: No. There ain't no way out.

OFFICER WOODS: There ain't no way out.

Come on. Talk. Don't sit there and look at the ceiling.

THE DEFENDANT: Hmm, I was just trying to think about the situation, you know. How I was just talking about one.

I'm kind of mixed up right now.

OFFICER WOODS: Yeah.

What do you mean? You're trying to get your thoughts together on how this one went down?

OFFICER LINCOLN: The situation, Duane, is such.

I mean this –

OFFICER WOODS: Trying to remember –

OFFICER LINCOLN: This is here. We're sitting here. The evidence is here and the three of us are here.

THE DEFENDANT: Mm-hmm.

OFFICER LINCOLN: I know all about the case.

I was there that night.

You know all about the case.

I'm just trying to share some thoughts with you so you can set me straight on some of the things that happened there.

You're an intelligent guy. So I imagine you have this natural curiosity too.

Put yourself in my place and I think you would want to know some of the same things that you are not clear of.

OFFICER WOODS: You would make a hell of a cop.

THE DEFENDANT: Would have anyway, huh?

OFFICER WOODS: Sure would.

Do you want him to say anything specific?

OFFICER LINCOLN: Did you know Mr. and Mrs. Helm, Duane, the people who owned the house?

THE DEFENDANT: No.

OFFICER LINCOLN: So you never been there before?

See, that's what I thought.

Now, was I right?

THE DEFENDANT: No, I never been there before.

OFFICER LINCOLN: How long were you outside that night?

Even better than that, where did you move your bicycle to?

I still can't quite figure that out.

THE DEFENDANT: How do you know it was my bicycle?

OFFICER LINCOLN: You tell me it wasn't your bicycle, huh.

THE DEFENDANT: It wasn't.

OFFICER LINCOLN: Oh, no?

THE DEFENDANT: Huh?

OFFICER LINCOLN: You borrowed one? Is that what you are telling me?

THE DEFENDANT: It wasn't my bicycle, yeah.

OFFICER WOODS: Was it one you had stolen?

THE DEFENDANT: Why, couldn't the lady identify it?

OFFICER LINCOLN: You know ladies.

THE DEFENDANT: Couple old ladies?

OFFICER LINCOLN: Didn't pay a whole lot of time and attention.

THE DEFENDANT: They probably should have.

OFFICER WOODS: They don't know about bicycles anyway if they had.

THE DEFENDANT: If I drove home and some bicycle was in my yard, I probably would have picked it up and took it inside.

OFFICER WOODS: What's an old lady need with a bicycle?

OFFICER LINCOLN: I guess when you live by the beach you don't need bicycles that much.

THE DEFENDANT: Huh?

OFFICER LINCOLN: I guess when you live by the beach you don't need bicycles that much.

THE DEFENDANT: You got tire impressions and stuff like that?

OFFICER LINCOLN: Did I show you tire impressions?

THE DEFENDANT: No. Then you ain't got them.

OFFICER WOODS: What would it prove anyway?

THE DEFENDANT: You could match the bike to the person who owned it.

OFFICER LINCOLN: Duane, you're dancing now.

You're waltzing around.

I don't need bicycles.

THE DEFENDANT: I know.

OFFICER LINCOLN: This is what I need (indicating).

THE DEFENDANT: I thought maybe you found some somewhere around there.

OFFICER LINCOLN: I wish I had.

What did you do with it?

You must have put it someplace?

Where?

Over in that field across from the house?

A lot of woods over in there.

That's where I'd probably put it.

Is that where you put it?

OFFICER WOODS: He don't have the bicycle, Duane. He's just trying to fill in the blanks, you know.

THE DEFENDANT: Yeah.

OFFICER LINCOLN: Duane knows.

OFFICER WOODS: Tell him.

OFFICER LINCOLN: There's only two places it could have – could have been, Duane, after you moved it. Either behind the house or in front of the house.

Which was it?

OFFICER WOODS: Well?

THE DEFENDANT: How do you know I even had a bike?

You don't even know that.

OFFICER LINCOLN: You tell me you didn't have a bicycle.

See, you won't lie, Duane.

I know you won't lie when you are confronted with the truth.

Now, are you going to tell me you didn't have a bicycle?

I know that much about you now.

You play by the rules. Those rules are important.

We all need rules.

Now, did you have a bicycle?

Of course, you did.

Now, where did you put it?

THE DEFENDANT: I don't want to talk about it.

OFFICER LINCOLN: Don't you think it's necessary to talk about it, Duane?

Two months have gone by already, Duane.

That's a long time. It's a long time for people to work. It's a long time for you to hold it within yourself. It's a long time for people to wonder.

OFFICER WOODS: And be scared.

OFFICER LINCOLN: Don't you think it's time to put all that to rest?

I think you do.

OFFICER WOODS: It's all over. You might as well.

You can't get around all this stuff.

You got no out.

OFFICER LINCOLN: This isn't going to disappear.

OFFICER WOODS: Do you like the guys from Boca more than you like us?

I told you you shouldn't have bought him that Whopper.

OFFICER LINCOLN: Yeah.

THE DEFENDANT: No, it's just circumstances surrounding it, you know.

OFFICER WOODS: It doesn't make any difference, Duane.

I know what you're thinking.

OFFICER LINCOLN: No.

OFFICER WOODS: And it really doesn't matter.

It's no different. And it's all here anyway, right.

OFFICER LINCOLN: I won't make you tell me something you're not comfortable in talking about, Duane.

But I do want to know some of the things that shouldn't hurt you that much to talk about.

What you did with the bicycle. How long you were outside the house. Those kinds of things.

I know what you're reluctant to talk about and I won't press you on that.

THE DEFENDANT: I don't see what them kind of things got to do with it anyway.

OFFICER LINCOLN: It's all part of the crime Duane.